179

Supreme Court, U.S.
FILED

10-925 JAN 11 2011

OFFICE OF THE CLERK

No. 10-

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD, INC.,
Petitioner,

v.

WILLIAM E. SHEPARD,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Eighth Appellate District

PETITION FOR A WRIT OF CERTIORARI

KEVIN C. ALEXANDERSEN
COLLEEN A. MOUNTCASTLE
HOLLY M. OLARCZUK-SMITH
GALLAGHER SHARP
Sixth Floor, Bulkley Bldg.
1501 Euclid Avenue
Cleveland, OH 44115
(216) 241-5310

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner

January 11, 2011 * Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether this case should be held pending this Court's resolution of *CSX Transportation, Inc.* v. *McBride*, No. 10-235 (U.S. granted Nov. 29, 2010), since both cases present the same issue: Whether the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, requires proof of proximate causation as an element of a claim for damages.

2. Whether the imposition of liability under FELA and the Locomotive Inspection Act based upon exposure to any diesel exhaust conflicts with this Court's decisions requiring courts to defer to a federal agency's interpretation of its own safety regulation.

LIST OF PARTIES AND AFFILIATES

The parties to this matter are listed in the caption to the petition.

RULE 29.6 STATEMENT

Petitioner Grand Trunk Western Railroad Company (sued in this matter as Grand Trunk Western Railroad, Inc.) ("GTW") is a wholly-owned subsidiary of Grand Trunk Corporation which is a wholly-owned subsidiary of Canadian National Railway Company, a publicly traded corporation.

No publicly held company owns more than 10% of GTW's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
JUDGMENT FOR WHICH REVIEW IS SOUGHT	1
JURISDICTION	1
STATUTES OR OTHER PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Statutory Background	5
B. Factual Background	7
C. Proceedings Below	9
REASONS FOR GRANTING THE PETITION	14
I. THIS CASE SHOULD BE HELD PENDING RESOLUTION OF *CSX TRANSPORTATION, INC.* v. *MCBRIDE*, NO. 10-235, BECAUSE IT PRESENTS THE SAME ISSUE OF WHETHER PROXIMATE CAUSATION IS AN ELEMENT IN A CASE UNDER FELA	15
II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S STANDARDS GOVERNING THE DEFERENCE DUE TO AN AGENCY'S INTERPRETATION OF ITS REGULATIONS	17
CONCLUSION	21

TABLE OF CONTENTS – continued

Page

APPENDICES

APPENDIX A: *Shepard* v. *Grand Trunk W. R.R.*, No. 2010-1092 (Ohio Oct. 3, 2010) (Order Of The Supreme Court Of Ohio Denying Discretionary Jurisdiction) 1a

APPENDIX B: *Shepard* v. *Grand Trunk W. R.R.*, No. 9010-1092 (Ohio Oct. 3, 2010) (Case Announcement)..... 2a

APPENDIX C: *Shepard* v. *Grand Trunk W. R.R.*, No. 92711 (Ohio Ct. App. Apr. 29, 2010)..... 3a

APPENDIX D: *Shepard* v. *Grand Trunk W. R.R.*, No. 558055 (Cuyahoga Cnty. Ct. Com. Pl. Dec. 24, 2008) (Opinion)..... 31a

APPENDIX E: Federal Statutes 36a

APPENDIX F: Federal Regulation 38a

TABLE OF AUTHORITIES

CASES Page

Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 4, 17
Consol. Rail Corp. v. *Battaglia*, No. 10-75 (U.S. filed July 13, 2010) 4
Consol. Rail Corp. v. *Gottshall*, 512 U.S. 532 (1994) 5
CSX Transp., Inc. v. *McBride*, No. 10-235 (U.S. granted Nov. 29, 2010) 3, 14, 21
Dixson v. *Burlington N. R.R.*, 795 F. Supp. 939 (D. Neb. 1992) 19
Kayner v. *Union Pac. R.R.*, No. 1003141, 2006 WL 4606753 (Dist. Ct. Douglas Cnty., Neb. Mar. 2, 2006) 19
Lyng v. *Payne*, 476 U.S. 926 (1986) 17
Norfolk & W. Ry. v. *Earnest*, 229 U.S. 114 (1913) 6
Norfolk S. Ry. v. *Sorrell*, 549 U.S. 158 (2007) 5, 6
Rogers v. *Mo. Pac. R.R.*, 352 U.S. 500 (1957) 3, 6
St. Louis, Iron Mountain & S. Ry. v. *McWhirter*, 229 U.S. 265 (1913) 6
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 4, 17, 19, 20
Urie v. *Thompson*, 337 U.S. 163 (1949) 5, 6

STATUTES AND REGULATIONS

45 U.S.C. § 51 ..... 2, 5
§ 51 *et seq.* 1
§ 53 5
49 U.S.C. § 20701 ..... 1, 2, 6, 15
49 C.F.R. § 229.43 ..... 2, 6
45 Fed. Reg. 21,092 (Mar. 31, 1980) 7, 18

TABLE OF AUTHORITIES – continued

OTHER AUTHORITY Page

2 Kenneth C. Davis, *Administrative Law Treatise* (2d ed. 1979)..... 4, 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner Grand Trunk Western Railroad Company ("GTW" or "Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Ohio.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinion of the Court of Common Pleas of Cuyahoga County, Ohio denying Petitioner's motion to enter judgment notwithstanding the verdict, or, alternatively, to grant a new trial is reproduced in the appendix to the petition ("Pet. App.") at 31a-35a. The opinion of the Court of Appeals of Ohio, Eighth Appellate District, affirming the judgment of the trial court, is reproduced at Pet. App. 3a-30a. The order of the Supreme Court of Ohio declining to review the decision of the Court of Appeals is reproduced at Pet. App. 1a-2a.

JURISDICTION

The final judgment of the Court of Appeals was announced on April 29, 2010 and entered on May 10, 2010. The Supreme Court of Ohio, with two justices dissenting, declined to review the decision of the Court of Appeals on October 13, 2010. Pet. App. 2a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, are reproduced at Pet. App. 36a. Relevant portions of the Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701, are reproduced at Pet. App. 37a. The Railroad

Locomotive Safety Standard appearing at 49 C.F.R. § 229.43(a) is reproduced at Pet. App. 38a.

STATEMENT OF THE CASE

In this case, Respondent William Shepard obtained a judgment for $872,756 in damages under FELA, 45 U.S.C. § 51, and the LIA, 49 U.S.C. § 20701, based upon his claim that he suffered from (1) chronic obstructive pulmonary disease ("COPD") and heart problems caused by exposure to diesel exhaust, and (2) throat cancer from exposure to asbestos while employed by Petitioner. Pet. App. 4a-5a. The Ohio Court of Appeals affirmed that judgment, concluding that (1) the causation element of FELA requires only that the "'negligence played any part, even the slightest, in producing the injury'" to the plaintiff, Pet. App. 17a, and (2) exposure to diesel exhaust, at any level, violates 49 C.F.R. § 229.43, a safety regulation promulgated by the Federal Railroad Administration (FRA), *id.* at 12a-13a. This case presents two issues of recurring national importance.

I. This case presents the issue whether a plaintiff must prove that an alleged violation of FELA (or the LIA) was a proximate cause of his injuries, or whether, as the court of appeals ruled, a plaintiff must show only that an alleged violation contributed, to any degree "'however, slight,'" "'no matter how slight,'" or "'even the slightest'" to plaintiff's alleged injuries. Pet. App. 14a. Petitioner proposed that the jury be required to find "proximate cause" and objected to the trial court's instructions which allowed the jury to find causation if Petitioner's conduct "play[ed] any part in the matter, however slight, in bringing about and actually causing injury or damage to Mr. Shepard." Trial Transcript ("Tr.") 1282-83. The trial court rejected Petitioner's

submission and its objections to the jury charge based upon its reading of *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500, 506 (1957). See Tr. 1260.

In *CSX Transportation, Inc.* v. *McBride*, this Court recently granted certiorari to decide the same issue: "Whether the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, requires proof of proximate causation." No. 10-235 (U.S. granted Nov. 29, 2010). Because this case presents the same issue of whether FELA requires a showing of proximate causation, this Court should hold the petition in this case pending resolution of *McBride*, and then resolve Question 1 of this Petition consistent with the decision in *McBride*.

II. Separate and apart from the FELA causation issue, this Court should grant certiorari to address whether the courts below violated this Court's precedent when they did not take into account the views of the Federal Railroad Administration (FRA) – the agency that promulgated the LIA safety regulation at issue in this case – when interpreting what that safety regulation requires.

In applying 49 C.F.R. § 229.43, the FRA looks to the exposure thresholds adopted by OSHA to determine compliance with the Locomotive Inspection Act. Tr. 989, *see id.* at 1001-02. That interpretation is consistent with the language of Section 229.43(a), and therefore is subject to deference under this Court's controlling decisions. The courts below, however, disregarded the FRA's interpretation and concluded that a railroad violates 49 C.F.R. § 229.43, whenever diesel exhaust makes its way into a locomotive cab. Pet. App. 12a-13a. The failure of the court of appeals to consider the FRA's interpretation of its safety regulation is contrary to this Court's holdings that require "substantial deference to an

agency's interpretation of its own regulations" so that "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted); see also *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord* 2 Kenneth C. Davis, *Administrative Law Treatise* § 7:22, at 105 (2d ed. 1979).

The erroneous ruling by the court of appeals is of surpassing importance because it imposes onerous and unwarranted burdens on railroads, subjecting them to liability without any finding that the levels of diesel exhaust or asbestos exposure exceed permissible thresholds identified by OSHA. Further, because a violation of an LIA safety regulation precludes application of comparative negligence principles, a railroad may be held liable for *all* damages suffered by a plaintiff even when, as here, the jury concluded that Respondent was overwhelmingly responsible for his medical conditions. Pet. App. 15a n.3. As a result, Petitioner was ruled liable for the entire $872,756 judgment even though the jury concluded that Respondent's negligence – smoking a pack of cigarettes each day for 45 years – made him 85% responsible for his throat cancer and 82% responsible his lung and heart ailments.

Because the decision below is irreconcilable with the standards established by this Court, certiorari should be granted on this second issue.[1]

---

[1] The same issue regarding liability under the LIA predicated on a violation of 49 C.F.R. § 229.43 also is presented in *Consolidated Rail Corp.* v. *Battaglia*, No. 10-75 (U.S. filed July 13, 2010). *Battaglia* Pet'n 28-31.

A. Statutory Background

For more than a century, FELA has provided a remedy under federal law for railroad workers whose workplace injury or death was caused by the actions of a railroad. 45 U.S.C. § 51. In interpreting 45 U.S.C. § 51, a judge or jury is guided by a clear and simple rule: "Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 165-66 (2007); *accord Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994); *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949). Thus, the elements of a common-law negligence claim apply to actions under FELA unless FELA's text explicitly rejects or obviously conflicts with the traditional common-law standard. *Sorrell*, 549 U.S. at 165-66.[2]

FELA differs from a traditional workers compensation statute in that it does not adopt no-fault liability in exchange for a cap on recoveries. Instead, FELA requires proof of railroad negligence and allows traditional tort damages. As a result, FELA plaintiffs must prove "causation, i.e., the relation of the negligence to the injury." *Id.* at 169. Shortly after FELA's enactment, this Court held that

---

[2] For example, FELA expressly departed from the common law by abolishing the contributory negligence defense and instead adopting a comparative negligence regime, which was an innovation when FELA was enacted in 1908. 45 U.S.C. § 53 ("that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."). FELA also "abolished the fellow servant rule [which] prohibited employers from contracting around the Act, and abolished the assumption of risk defense." *Sorrell*, 549 U.S. at 168.

a plaintiff proceeding under FELA must prove that the injury flows *proximately* from the railroad's negligence. *E.g.*, *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 118-20 (1913); *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913).

More than 40 years later, in *Rogers* v. *Missouri Pacific Railroad*, this Court stated that in actions under FELA "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 508. In the wake of this language from *Rogers*, lower federal and state courts have applied differing standards to the element of causation under FELA. *Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring).

Under the FELA, a plaintiff also may establish negligence by demonstrating that the railroad violated a safety statute, thereby making the railroad negligent *per se*. See *Urie*, 337 U.S. at 174. One such safety statute is the LIA (originally, "the Boiler Inspection Act"), which requires railroads to keep locomotives "in proper condition and safe to operate without unnecessary danger of personal injury." 49 U.S.C. § 20701(1).

To implement this statutory command, the FRA promulgated 49 C.F.R. § 229.43(a), which provides:

> Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions.

Id. FRA explained, when it adopted the current version of Section 229.43, that "it is impossible to

prevent the entry of some fumes into the cab in certain unusual wind and weather conditions." 45 Fed. Reg. 21,092, 21,098 (Mar. 31, 1980).

As explained by Petitioner's expert, FRA intended Section 229.43 to protect employees from excessive harmful levels of diesel exhaust pursuant to OSHA regulations, not to assure perfect working conditions. Tr. 989, 1001. Specifically, Edward English, the former Director of the FRA's Office of Safety Assurance and Compliance, explained that the FRA does not consider Section 229.43 violated where (1) there is no defect in the exhaust system and (2) the engine stacks are at the proper height even if some diesel exhaust enters the cab during normal operating procedures. *Id.* Under these circumstances, there is no violation of Section 229.43 unless the diesel exhaust entering the cab of a locomotive exceeds permissible standards set forth by OSHA. *Id.* at 989, 1002, 1044.[3]

B. Factual Background

Respondent William Shepard began his employment with the Detroit & Toledo Shoreline Railroad ("DTS") in June 1950 as a "fireman" working on steam engines. Pet. App. 5a & n.1. Diesel engines soon replaced steam engines, and Respondent became an engineer on diesel engines from 1954 until his retirement in 1991. *Id.* at 5a. Respondent continued

---

[3] Likewise, in a 1996 Report to Congress, FRA explained that it employs the OSHA criteria to determine compliance with the Locomotive Inspection Act. The trial court granted respondent's motion to exclude the 1996 Report from evidence because Respondent ceased working for Petitioner in 1991. Tr. 137-39. The court of appeals likewise rejected Petitioner's challenge to the exclusion of the 1996 Report. Pet. App. 22a.

to work for the DTS in Toledo, Ohio until 1989 or 1990 when the DTS merged with GTW. *Id.* at 5a n.1.

Respondent was diagnosed with COPD in December 1986. Pet. App. 6a. In August 2000, Respondent was diagnosed with laryngeal cancer. *Id.* He underwent radiation therapy and is cancer-free. Tr. 600 (Khan Video Dep. Tr. 37, 110). Respondent "admitted to a long history of heavy cigarette smoking," Pet. App. 6a, *i.e.*, he smoked, on average, a pack of cigarettes each day for 45 years (1946 to 1991), and thereafter he smoked intermittently from 1991 until 1993. The parties' medical experts agreed that the primary cause of Respondent's injuries was his extensive smoking history. *E.g.*, Tr. 888-95. Indeed, Respondent's counsel conceded that Mr. Shepard is "going to take half the responsibility for the damage that's been done to him." *Id.* at 1249 (closing argument); see also *id.* at 1195-96 (same).

As an engineer, Respondent was required to inspect the locomotives he operated and report defective or unsafe conditions. Tr. 783, 834-35. Respondent never reported a defect related to diesel exhaust or asbestos in a locomotive cab nor did he ever refuse to work on, with or around a locomotive because it smelled of diesel exhaust or contained asbestos. *Id.* at 460 (Shepard Video Dep. Tr. 58, 78-79, 85).

Fourteen years after he retired, Respondent filed suit alleging that his lung and heart injuries were caused by exposure to diesel exhaust and that his throat cancer was caused by exposure to asbestos-containing material in the locomotive cabs in which he worked. Respondent's position at trial was that every diesel locomotive he worked on during his 41-year career with the railroad was defective under the LIA because diesel exhaust entered the cab. *E.g.*, Tr. 583-84. Respondent and a co-worker offered

anecdotal testimony that diesel emissions came into the cab of the locomotive through cracks in the windows and doors. *Id.* at 583; see also *id.* at 460 (Shepard Video Dep. Tr. 39, 102).[4] Respondent acknowledged that diesel exhaust "was venting outside" the locomotive and then "coming in as it was traveling back towards the cab." *Id.* at 460 (Shepard Video Dep. Tr. 78). There was no evidence that Respondent was exposed to diesel exhaust or asbestos at levels in excess of permissible OSHA standards. Tr. 830, 1002, 1044.

C. Proceedings Below

1. In March 2005, Respondent filed suit in the Court of Common Pleas of Cuyahoga, Ohio, alleging that exposure to asbestos had caused his throat cancer and that exposure to diesel fumes had caused his COPD and heart problems. Pet. App. 4a. He admitted that he smoked a pack of cigarettes each day for 45 years. Tr. 460 (Shepard Video Dep. Tr. 14). Respondent asserted LIA and FELA claims, alleging both that the railroad violated the LIA through 49 C.F.R. § 229.43, and that this violation had a sufficient causal relationship to his injuries to warrant relief under FELA. Pet. App. 4a.

With regard to Respondent's LIA claim based on an alleged violation of 49 C.F.R. § 229.43, Petitioner's expert, Edward English, the former Director of the FRA's Office of Safety Assurance and Compliance, explained that the FRA interprets this regulation to

---

[4] According to Respondent, on one type of locomotive engine (GP9) exhaust would come up from the floorboards. Tr. 460 (Shepard Video Dep. Tr. 45). Respondent testified that he worked on locomotives with GP9s in the late 1980s or early 1990s, *after* he already had been diagnosed in 1986 with COPD. *Id.* (Shepard Video Dep. Tr. 77).

prohibit (1) diesel exhaust entering the cab at levels that exceed permissible thresholds set by OSHA; or (2) a locomotive engine with a defect, such as a crack in the exhaust system or manifold head gaskets. Tr. 1000-02. Mr. English explained that if "the engine is simply running on the track, without that type of defect and the stacks are high enough to exhaust into the air but some diesel exhaust enters the cab during ordinary running," that would not be a violation of Section 229.43. *Id.* at 1001-02.

Respondent failed to show that any of these conditions existed on any locomotives. For example, Respondent's expert, Dr. Leonard Vance, an industrial hygienist, admitted that he could not "identify a specific fault or defect in the chain of exhaust" or "point to a specific defect . . . , for example, a crack in a muffler or something along those lines, that sort of thing." Tr. 831, 833. Nor did Respondent introduce evidence that the alleged level of diesel emissions or asbestos in the cabs exceeded any applicable OSHA standards. *Id.* at 830, 999-1000, 1002, 1044. Instead, Respondent's evidence involved general assertions of a diesel fuel exhaust smell and the presence of material in the locomotives that Respondent believed was asbestos.

Petitioner proposed a jury instruction that would obligate Respondent to show proximate causation:

> If you find that the railroad was negligent, you must next determine whether the railroad's negligence caused the Plaintiff's injury in whole or in part. You need not find that the railroad's negligence was the sole cause, but you must find that it was a proximate cause of the Plaintiff's injury.

See GTW Proposed Jury Instructions at 35 (citing *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923); *Brady* v. *Southern Ry.*, 320 U.S. 476, 483 (1943)).

The trial court rejected Petitioner's submission and instead proposed to instruct the jury that Respondent could establish liability by showing that the alleged violations were a cause "however slight," "no matter how slight" or "even the slightest." Relying on *Sorrell* and the language of FELA, petitioner requested that the trial court omit such phrases from the jury instruction and requested that the jury be charged pursuant to the specific language of the FELA. Tr. 1260-61. The trial court overruled Petitioner's objection, concluding that the decision in *Sorrell* declined to reconsider the ruling in *Rogers* and therefore the court would follow its reading of *Rogers*. *Id.* at 1260. As a result, the trial court instructed the jury to find Petitioner liable if "the employer's negligence under the FELA or a violation of the Locomotive Inspection Act played any part, no matter how slight, in causing injury to the plaintiff." *Id.* at 1282-84.[5]

Applying this relaxed causation standard, the jury determined that GTW violated the FELA and the LIA. Pet. App. 5a. The jury returned an award of $872,756, consisting of $735,756 for his COPD/heart condition claim based on exposure to diesel exhaust and $137,000 for his cancer claim based on asbestos exposure. See Jury Interrogatory, General Verdict Forms. The jury also found Respondent 82%

---

[5] When it instructed the jury on the causation standard applicable to Respondent's contributory negligence, the trial court omitted these same qualifying phrases. Tr. 1289, 1291-92. The court of appeals acknowledged that this was error, but concluded that this error was harmless. Pet. App. 15a n.3.

negligently responsible for his COPD/heart condition and 85% responsible for his throat cancer due to his extensive smoking history. *Id.* Given the LIA finding, Respondent's overwhelming comparative fault was negated, and Petitioner was liable for the entire judgment. The trial court rejected Petitioner's request for judgment notwithstanding the verdict and its request for a new trial. Pet. App. 4a-5a, 35a.

2. On appeal, Petitioner explained that the trial court erred by adopting both an erroneous causation standard under FELA and an erroneous interpretation of the requirements of the LIA.

First, Petitioner argued that the "any part, even the slightest" language from *Rogers* was not the proper standard for proving causation because FELA requires a plaintiff to prove that "'negligence was the proximate cause in whole or in part'" of the employee's injury. Pet. Appellate Br. 23 (quoting *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944)). Petitioner explained that "[s]ince the inception of the FELA, a plaintiff has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's injury," and that the trial court erroneously adopted a "relaxed causation standard," *i.e.*, "the 'in the slightest' standard . . . urged by [Respondent]." *Id.*

Second, Petitioner argued that the FRA has determined that there is no violation of 49 C.F.R. § 229.43 "where the engine in service has no defect in the exhaust system and the engine stacks are at the proper height but some diesel exhaust still enters the cab during normal operating procedures." *Id.* at 17. Rather, Petitioner argued that "the FRA has adopted [OSHA] exposure limits for diesel exhaust to determine violations of the LIA," *id.* at 15, and, according to the FRA, there is no violation of 49

C.F.R. § 229.43 "unless the diesel exhaust entering the cab of a locomotive exceeds permissible standards set forth by OSHA," *id.* at 17.

The Ohio Court of Appeals affirmed. First, the court rejected Petitioner's challenge to the trial court's causation instructions. It adhered to the position that "jury instructions in a FELA railroad case containing the phrase 'even the slightest'" are appropriate. Pet. App. 17a. Specifically, it concluded that it is appropriate for a trial court to instruct a jury that a railroad may be found liable if its "'negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Id.* (quoting *Rogers*, 352 U.S. at 506).

Likewise, the court below held that 49 C.F.R. § 229.43 "'prohibits diesel exhaust from coming into the cab of a locomotive.'" Pet. App. 12a (quoting testimony of plaintiff's expert, Dr. Vance). The court of appeals did not address the FRA's interpretation of 49 C.F.R. § 229.43. Instead, the court of appeals determined that it was sufficient to impose absolute liability under the LIA without any evidence quantifying exposure levels and without any evidence of a defect in the locomotive exhaust system. Pet. App. 12a-13a.

3. Petitioner sought discretionary review in the Ohio Supreme Court. Petitioner challenged the court of appeals' rulings as to the standard for proving causation under FELA. See Memorandum in Support of Jurisdiction of Grand Trunk Western Railroad 10-13 (June 22, 2010). Petitioner argued that the court of appeals improperly "eliminated proximate causation in FELA cases." *Id.* at 11. Petitioner also challenged the court of appeals' decision regarding the standard for establishing liability under the LIA based on a violation of 49

C.F.R. § 229.43. *Id.* at 8-10. Petitioner argued that the "FRA intended §229.43 to protect employees from excessive harmful levels of diesel exhaust pursuant to OSHA regulations, not to assure perfect working conditions." *Id.* at 10.

The Ohio Supreme Court declined to review the decision of the court of appeals, with two justices dissenting. Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

The petition should be granted to resolve two issues of nationwide importance.

I. The decision below implicates the same deep division of authority among the lower federal and state courts that caused this Court to grant certiorari in *CSX Transportation, Inc.* v. *McBride*, No. 10-235 (U.S. granted Nov. 29, 2010). There, as here, the judgment below turns on whether FELA requires the jury to find that the alleged violation was a proximate cause of the injury or whether this Court's decision in *Rogers* "relaxes" plaintiff's traditional requirement to prove proximate causation in an action under FELA. Because the Court's ruling on the causation issue in *McBride* would control all of the claims in this case, this petition should be held pending this Court's resolution of *McBride*, and then resolved in accordance with the ruling in *McBride*.

II. Separately, certiorari is warranted to review the lower courts' refusal to follow the FRA's interpretation of the requirements of Section 229.43. In assessing whether a railroad has violated 49 C.F.R. § 229.43(a), the FRA employs OSHA's criteria regarding workplace concentration limits for the common products of diesel fuel combustion to determine compliance with the LIA. Tr. 989, 1001-

02, 1044. The courts below refused to follow the FRA's interpretation, and instead ruled that the entry of *any* diesel exhaust into a locomotive cab violates the LIA even in the absence of any defect in the locomotive equipment, and even if diesel exhaust levels are below permissible thresholds adopted by OSHA.

In reaching this conclusion, the court of appeals below ignored this Court's cases holding that courts must defer to an expert agency's reasonable interpretation of its own regulations. Instead, the courts below adopted an interpretation of an FRA regulation that imposes liability without any showing that employees are exposed to conditions that create "unnecessary danger of personal injury." 49 U.S.C. § 20701(1). That ruling places substantial and unwarranted burdens on railroads that stand in stark contrast to the FRA's own interpretation of its safety regulation. Review of this second issue should be granted because the ruling below conflicts with the controlling interpretive rules set forth by this Court.

I. THIS CASE SHOULD BE HELD PENDING RESOLUTION OF *CSX TRANSPORTATION, INC.* v. *MCBRIDE*, NO. 10-235, BECAUSE IT PRESENTS THE SAME ISSUE OF WHETHER PROXIMATE CAUSATION IS AN ELEMENT IN A CASE UNDER FELA.

This Court recently granted review in *McBride* to resolve the clear conflict among the lower courts on the question whether FELA requires the plaintiff to establish proximate causation. This case presents the same issue regarding the proper standard of causation under FELA. This case should be held pending resolution of *McBride*, and thereafter, Question 1 of this petition should be resolved in accordance with that decision.

This case implicates this same conflict as *McBride*. In this case, the jury was instructed that it could find causation under FELA if it concluded that Petitioner's conduct "play[ed] any part in the matter, however slight, in bringing about and actually causing injury or damage to Mr. Shepard." Tr. 1282-83; see *id.* at 1284. Petitioner proposed a "proximate cause" instruction and objected to the relaxed causation standard that the trial court gave to the jury. The trial court overruled Petitioner's objection. *Id.* at 1260-61. The Ohio Court of Appeals rejected Petitioner's challenge to this instruction on the merits. Pet. App. 14a-17a.

Whether FELA requires the jury to find proximate causation will directly affect the outcome of this case. A properly instructed jury could very well have concluded that Respondent's injuries were not proximately caused by Petitioner and would have occurred as a result of his smoking a pack of cigarettes each day for 45-years. That conclusion is bolstered by the jury's finding that Respondent's negligence – his history of smoking – made him overwhelmingly responsible (82% and 85% responsible) for his injuries.

The trial court's erroneous instruction eliminated the requirement that Respondent establish that the conduct of Petitioner was a proximate cause of his injuries. Instead, the jury was allowed to return a verdict against Petitioner based on a finding that Petitioner's conduct was a cause "however slight, in bringing about and actually causing injury or damage to Mr. Shepard." Tr. 1282-83; see also, *e.g.*, *id.* at 1284 ("It is up to you to determine whether the Defendant, under either of these two statutes, played any part, even the slightest, in bringing about his condition").

If the Court concludes in *McBride* that FELA requires a showing of proximate causation, then Petitioner respectfully submits that the petition should be granted, the judgment below should be vacated, and the case remanded to the lower courts for a new trial.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S STANDARDS GOVERNING THE DEFERENCE DUE TO AN AGENCY'S INTERPRETATION OF ITS REGULATIONS.

Separately, review should be granted on the second question presented because the decision below conflicts with this Court's decisions holding that courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.*, 512 U.S. at 512. As this Court has explained, in construing the requirements of a federal rule, "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* (internal quotation marks omitted); *accord Lyng* v. *Payne*, 476 U.S. 926, 939 (1986); *accord Bowles*, 325 U.S. at 414; Davis, *supra*, § 7.22, at 105.

The decision below violates these standards because the court of appeals never assessed whether the FRA's interpretation of Section 229.43(a) was "plainly erroneous" or "inconsistent with the regulation." Instead, the court of appeals adopted its own reading of the requirements of Section 229.43(a) and, based on that erroneous interpretation, concluded that the evidence supported liability against Petitioner.

The court of appeals did not assess whether the exhaust allegedly entered the cab after being released

from the exhaust stack or whether it entered the cab directly as a result of a defect in the locomotive's exhaust system. Likewise, the court of appeals did not evaluate whether the diesel exhaust exceeded the threshold standards set forth by OSHA. The use of OSHA exposure standards for diesel exhaust by the FRA demonstrates that generalized testimony from a plaintiff or a co-worker about the smell of diesel fumes is not enough to establish a federal violation. But according to the Ohio Court of Appeals, Section 229.43 "prohibits diesel exhaust from coming into the cab of a locomotive[.]" Pet. App. 12a (internal quotation marks omitted).

The court of appeals did not address the FRA's interpretation of 49 C.F.R. § 229.43 as set forth by Edward English, the former Director of the FRA's Office of Safety Assurance and Compliance. Tr. 999-1002. Instead, the court of appeals determined that it was sufficient to impose absolute liability under the LIA based on the mere presence or smell of diesel fumes in a locomotive cab without any evidence quantifying exposure levels and absent any evidence of a defect in the locomotive equipment. Pet. App. 12a-13a.

In marked contrast, the FRA's interpretation of Section 229.43 properly takes into account concerns regarding exposure to levels of diesel exhaust deemed "toxic" by OSHA while recognizing that "it is impossible to prevent the entry of some fumes into the cab in certain unusual wind and weather conditions." 45 Fed. Reg. at 21,098. FRA's interpretation is thus faithful to the language of Section 229.43(a), addresses the core concern of exposure to "toxic" levels of diesel exhaust and is therefore reasonable under the circumstances. The FRA's interpretation of Section 229.43(a) thus should

have been accorded "controlling weight." *Thomas Jefferson Univ.*, 512 U.S. at 512.

By refusing to do so, the court of appeals' decision effectively requires railroads to insure that locomotive cabs are airtight or risk liability whenever diesel exhaust at any level is able to make its way inside the locomotive cab.[6] Indeed, the court of appeals embraced Mr. Shepard's position that "the presence of diesel exhaust fumes inside the locomotive cabs" is a direct violation of Section 229.43. Compare Respondent's Appellate Br. 19 ("the presence of diesel fumes in the locomotive cab was a direct violation of [Section 229.43]"), with Pet. App. 12a-13a (following prior decision which held that Section 229.43 "'prohibits diesel exhaust from coming into the cab of a locomotive'") (quoting testimony of Respondent's witness Dr. Leonard Vance). As a result, the court of appeals adopted a *per se* standard under which Petitioner is strictly liable based solely on the presence of diesel exhaust fumes in the locomotive cabs. Pet. App. 12a.

This is a virtually impossible standard for railroads to defend, and effectively renders every locomotive in possible violation of a federal safety regulation. The decision below requires railroads to insure that no diesel exhaust, at any level, ever makes its way into a locomotive cab or risk liability under the LIA. *Dixson* v. *Burlington N. R.R.*, 795 F. Supp. 939, 940 (D. Neb. 1992) (holding that Section 229.43 is ambiguous as to

---

[6] *Kayner* v. *Union Pac. R.R.*, No. 1003141, 2006 WL 4606753 (Dist. Ct. Douglas Cnty., Neb. Mar. 2, 2006) ("the LIA regulation, 49 C.F.R. 229.43, does not provide that the cab must be entirely free of all diesel exhaust, . . . only that the locomotive exhaust stacks be of sufficient height to allow the diesel exhaust to be released entirely outside the cab and to prevent reentry of the exhaust under usual operating conditions").

whether it applies only to the lead locomotive). Even if the court of appeals' reading were a permissible one, the decision below ignores that the FRA is responsible for deciding "which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson Univ.*, 512 U.S. at 512.

Review should be granted because the court of appeals' refusal to defer to the FRA's interpretation of Section 229.43(a) conflicts with this Court's precedent governing the interpretation of federal regulations. Moreover, the draconian interpretation of the regulation coupled with the rejection of a requirement of proximate causation eviscerates the requirement that employees are only entitled to damages for injuries that are the product of a railroad's negligence. The regime in Ohio effectively makes the railroad the guarantor of its employees' health, even when there clearly are multiple potential causes of injury.

This is not the liability scheme that Congress implemented in the FELA and only review by this Court can put FELA back on the right course.

CONCLUSION

For these reasons, with respect to Question 1, the petition for a writ of certiorari should be held pending resolution of *CSX Transportation, Inc.* v. *McBride*, No. 10-235 (U.S. granted Nov. 29, 2010), and then resolved in accord with the Court's decision in that case. Alternatively, the petition should be granted as to Question 2.

Respectfully submitted,

KEVIN C. ALEXANDERSEN
COLLEEN A. MOUNTCASTLE
HOLLY M. OLARCZUK-SMITH
GALLAGHER SHARP
Sixth Floor, Bulkley Bldg.
1501 Euclid Avenue
Cleveland, OH 44115
(216) 241-5310

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner

January 11, 2011

* Counsel of Record

APPENDIX

APPENDIX A

THE SUPREME COURT OF OHIO

[Filed OCT 13 2010]

Case No. 2010-1092

WILLIAM E. SHEPARD

v.

GRAND TRUNK WESTERN RAILROAD, INC.

ENTRY

Upon consideration of the motion for admission pro hac vice of Michael L. Torcello by Christopher M. Murphy,

It is ordered by the Court that the motion for admission pro hac vice is granted.

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

(Cuyahoga County Court of Appeals; No. 92711)

/s/ Eric Brown
ERIC BROWN
Chief Justice

APPENDIX B

THE SUPREME COURT OF OHIO

CASE ANNOUNCEMENTS
October 13, 2010
[Cite as *10/13/2010 Case Announcements*, 2010-Ohio-4928.]

---

* * * *

APPEALS NOT ACCEPTED FOR REVIEW

* * * *

2010-1092, Shepard v. Grand Trunk W. RR., Inc.

Cuyahoga App. No. 92711, 2010-Ohio-1853. Discretionary appeal not accepted.

Lundberg Stratton and O'Donnell, JJ., dissent.

Motion for admission pro hac vice of Michael L. Torcello by Christopher M. Murphy granted.

* * * *

APPENDIX C

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION

No. 92711

WILLIAM E. SHEPARD
Plaintiff-Appellee

vs.

GRAND TRUNK WESTERN RAILROAD, INC.
Defendant-Appellant

JUDGMENT:

AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-558055

BEFORE: McMonagle, P.J., Sweeney, J., and Cooney, J.

RELEASED: April 29, 2010

JOURNALIZED:

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the

judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Grand Trunk Western Railroad, Inc., appeals from the trial court's judgments denying its motions for (1) summary judgment, (2) a directed verdict, (3) judgment notwithstanding the verdict (JNOV), or alternatively, a new trial, and (4) remittitur. Grand Trunk also challenges a portion of the court's jury instructions.

Procedural History

{¶ 2} In March 2005, plaintiff-appellee, William E. Shepard, filed this action under the Federal Employers' Liability Act (FELA) and the Locomotive Inspection Act (LIA). Shepard alleged that during his employment with the railroad, he was exposed to asbestos and diesel fumes in violation of the FELA and the LIA, and that as a result of such exposure, he developed chronic obstructive pulmonary disease (COPD), heart conditions, and laryngeal cancer.

{¶ 3} Grand Trunk filed a motion for summary in which it alleged that the action was filed outside of the three-year statute of limitations under the FELA. The motion was denied. The case proceeded to a jury trial. The railroad moved for a directed verdict at the conclusion of both Shepard's case and the presenta-

tion of all the evidence; both motions were denied. The jury returned a verdict in favor of Shepard, finding that the railroad had violated the FELA and the LIA, and awarded $872,756 to Shepard. The trial court subsequently entered a judgment in that amount in favor of Shepard. Grand Trunk filed motions for JNOV, or alternatively, a new trial, and remittitur, which were denied.

Facts

{¶ 4} Shepard began his employment with the railroad in 1950 and worked there continuously until his retirement in 1991.[1] Initially, he worked as a fireman on steam engines, and in 1954, became an engineer on the diesel engines until his retirement. He alleged that in both capacities he was exposed to asbestos and diesel exhaust fumes. Specifically, Shepard testified that as a fireman, he was exposed to asbestos and asbestos dust while working on the engines and in the buildings, especially in the roundhouse where the steam engines were repaired. According to Shepard, the asbestos lining the steam engine pipes where he worked were "raggedy" and asbestos was on the floor and piled against the walls in the roundhouse. He described "walking through" loose asbestos in the roundhouse. Shepard also testified that he was exposed to asbestos on the pipes of the diesel engines when he worked as an engineer.

{¶ 5} Shepard further described his exposure to diesel fumes. He testified that many times the diesel fumes "would come into your cab and just about suffocate you." According to Shepard, the fumes would enter the cab through leaky windows and

---

[1] He started with the Detroit & Toledo Shoreline Railroad; it merged with Grand Trunk in 1989 or 1990.

doors, as well as through the floorboards. He described how he and his coworkers would sometimes stuff the cracks with paper towels. Shepard further testified that he was exposed to diesel fumes when he worked in the yard where the engines operated.

{¶ 6} Shepard began having breathing problems at least by 1986. He was diagnosed with COPD in December 1986, had heart surgery in the late 1980's, and was diagnosed with laryngeal cancer in August 2000. He testified that sometime prior to 1987, a doctor told him that his breathing problems could have been caused by his environment. He further testified, however, that he never told the doctor what he did for a living and he only saw that doctor on one occasion. According to Shepard, no other doctor or health care provider told him that his problems were related to his work.

{¶ 7} Shepard testified that he did not know, or have reason to know, that the substances he was exposed to were harmful to his health. He explained that the first time he became aware of the harmful effects of the substances was in 2005 when he was at a picnic for the railroad's retirees, saw a sign posted about breathing problems, and heard some other retirees discussing it.

{¶ 8} Shepard admitted to a long history of heavy cigarette smoking. Further facts will be developed in addressing the assignments of error.

Law and Analysis

The FELA and LIA

{¶ 9} A brief review of the FELA and LIA will be helpful. The FELA provides, in relevant part, that: "[e]very common carrier by railroad while engaging

in [interstate] commerce * * * shall be liable to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the [carrier's] negligence." 45 U.S.C. §51.

{¶ 10} To recover damages under the FELA, the plaintiff's injury must occur while acting within the scope of his employment and in furtherance of the employer's interstate business. See *Green v. River Terminal Ry. Co.* (C.A.6, 1985), 763 F.2d 805, 808. The employer's negligent conduct must also play a role in causing the employee's injury. Id.

{¶ 11} Congress enacted the FELA as a "broad remedial statute" to assist railroad employees when an employer's negligence causes injury. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell* (1987), 480 U.S. 557, 561-62, 107 S.Ct. 1410, 94 L.Ed.2d 563. The FELA is a "response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Missouri Pacific RR. Co.* (1958), 356 U.S. 326, 329, 78 S.Ct. 758, 2 L.Ed.2d 799. The Act is intended to be read liberally in favor of injured railroad employees. *Urie v. Thompson* (1949), 337 U.S. 163, 180, 69 S.Ct. 1018, 93 L.Ed. 1282.

{¶ 12} To supplement the FELA and to "facilitat[e] employee recovery," Congress enacted the LIA.[2] *Urie* at 189, 191; 49 U.S.C. §20701. The LIA requires that a locomotive must be "safe to operate without unnecessary danger of personal injury." Id. The LIA additionally empowers the Secretary of Transporta-

---

[2] Formerly known as the Locomotive Boiler Inspection Act.

tion to prescribe regulations applicable to the railroad industry. When an employee can prove an employer has violated the LIA or a rule or regulation promulgated under the LIA, this "is effective to show negligence as a matter of law"; the employee need not show that the defendant employer's conduct was unreasonable. *Urie* at 189. So while the FELA generally requires that negligence be shown, a violation of LIA and its regulations suffices to prove negligence.

{¶ 13} The FELA and LIA should be read together as companion statutes. *Baltimore & O.R. Co. v. Groeger* (1925), 226 U.S. 521, 528, 45 S.Ct. 169, 69 L.Ed. 419. Because the LIA does not create an independent cause of action for personal injuries, injured parties rely on the FELA to recover damages caused by a LIA violation. *Matson v. Burlington N. Santa Fe RR.* (C.A.10, 2001), 240 F.3d 1233, 1235.

Motion for Summary Judgment

{¶ 14} In its first assignment of error, the railroad contends that the trial court erred by denying its motion for summary judgment.

{¶ 15} Appellate review of the trial court's ruling on a motion for summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. The Ohio Supreme Court enunciated the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-70, 1998-Ohio-389, 696 N.E.2d 201, as follows:

{¶ 16} "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said

party being entitled to have the evidence construed most strongly in his favor."

{¶ 17} Grand Trunk's motion for summary judgment was based on its claim that Shepard filed his case outside of the applicable statute of limitations. We disagree.

{¶ 18} The FELA provides that "no action shall be maintained under this act unless commenced within three years from the day the cause of action accrued." 45 U.S.C. §56. Courts have consistently used "the discovery rule" to determine when the statute of limitations for a FELA claim begins to run. *Urie* at 170; *Campbell v. Grand Trunk W. RR. Co.* (C.A.6, 2001), 238 F.3d 772, 775; *Shesler v. Consol. Rail Corp.*, 151 Ohio App.3d 462, 2003-Ohio-320, 784 N.E.2d 725, ¶76. Under the discovery rule, the statute of limitations "begins to run when the reasonable person knows, or in the exercise of due diligence should have known, both his injury and the cause of that injury." *Campbell* at 775.

{¶ 19} Grand Trunk argues that at least by the late-1980's, in regard to the COPD, and by August 2000, in regard to the laryngeal cancer, Shepard had an affirmative duty to investigate the cause of his illnesses. In support of its claim, the railroad relies solely on Shepard's admission that, sometime prior to 1987, a doctor told him that his breathing problems could have been caused by his environment.

{¶ 20} Shepard, however, testified and averred (in a discovery deposition and affidavit) that he only saw that doctor on one occasion, he never told him what he did for a living, and no other doctors or health care providers ever alerted him to the cause of his health problems. Shepard further testified that although he

knew what asbestos was and that he was working with it, he did not know it, or the diesel fumes, were harmful and the railroad never provided any warnings or indication to its employees that they were. Further, Shepard had a long history of heavy cigarette smoking. In fact, in regard to Shepard's laryngeal cancer, the railroad's expert on this issue, Dr. Pierre Lavertu, was of the opinion that "the relationship between asbestos and laryngeal cancer is still controversial" and that Shepard's cancer was "secondary to his smoking habits." Thus, had Shepard seen Dr. Lavertu upon being diagnosed with laryngeal cancer, he would not have been told that his cancer was related to his asbestos exposure.

{¶ 21} On this record, the trial court did not err by denying Grand Trunk's summary judgment motion. The first assignment of error is overruled.

Motions for Directed Verdict and JNOV

{¶ 22} For its second assigned error, Grand Trunk contends that the trial court erred by denying its motions for a directed verdict and JNOV.

{¶ 23} Civ.R. 50 sets forth the standard for granting a motion for a directed verdict:

{¶ 24} "When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶ 25} The same standard applies to a motion for judgment notwithstanding the verdict. *Chem. Bank of New York v. Neman* (1990), 52 Ohio St.3d 204, 207, 556 N.E.2d 490. We employ a de novo standard of review in evaluating the grant or denial of a motion for directed verdict or a motion for judgment notwithstanding the verdict. *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 90, 509 N.E.2d 399.

1. Diesel Exhaust

{¶ 26} The railroad maintains that Shepard failed to demonstrate an injury based on exposure to diesel exhaust. Specifically, it claims that Shepard failed to demonstrate that the locomotives on which he worked were not in proper condition and were not safe to operate.

{¶ 27} The LIA provides that: "A railroad carrier may use or allow to be used a locomotive or tender on its railroad lines only when the locomotive or tender and its parts and appurtenances —

{¶ 28} "(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

{¶ 29} "(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

{¶ 30} "(3) can withstand every test prescribed by the Secretary under this chapter." 49 U.S.C. §20701.

{¶ 31} This court has held that "the LIA may be violated in two ways: (1) by failing to comply with Federal Railway Regulations, or (2) by fail[ing] to keep the locomotive in safe working condition." *Hager v. Norfolk & W. Ry. Co.*, Cuyahoga App. No. 87553, 2006-Ohio-6580, ¶31, citing *Mosco v. Baltimore &*

Ohio RR. (C.A.4, 1987), 817 F.2d 1088, 1091; *Reed v. Norfolk S. Ry. Co.* (N.D.Ohio, 2004), 312 F.Supp.2d 924, 926.

{¶ 32} Shepard's claim relative to exposure to diesel fumes was based on 49 C.F.R. §229.43(a), which provides that "[p]roducts of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating circumstances."

{¶ 33} In *Hager*, supra, this court found that the denial of a railroad's motion for a directed verdict on the plaintiff's claim of injury due to exposure to diesel fumes was proper. The employee offered the testimony of Dr. Leonard Vance, an industrial hygienist, who also testified for Shepard in this case. His opinion in this case was the same as in *Hager*: "Well, the Federal Railroad Administration has a regulation that prohibits diesel exhaust from coming into the cab of a locomotive, and what [Shepard] told me in his testimony in his deposition was consistent with that, was that it was a commonplace thing; that routinely happened that the cab would get diesel exhaust in. So I offered an opinion on whether or not the railroad had complied with that regulation. The opinion was that it hadn't." See, also, *Hager* at ¶34.

{¶ 34} Grand Trunk argues that *Hager* is not dispositive because: (1) it conflicts with this court's opinion in *Shesler*, supra, which stated that "[t]o establish a violation of the LIA, a plaintiff must show that the carrier's equipment is defective[,]" (citations omitted) id. at ¶62, and (2) there was testimony in this case that the fumes entered the cabs through windows opened by employees — a circumstance

beyond the control of the railroad. We are not persuaded.

{¶ 35} First, although this court in *Shesler* did cite a 1948 Second Circuit case for the proposition that a plaintiff must demonstrate that a carrier's equipment was defective to show a violation of the LIA, this court also stated that "[f]urther, the jury could find that the conditions to which the appellees were exposed on the appellant's railroad posed the very 'unnecessary danger of personal injury' contemplated by [the] LIA. 'Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.'" *Shesler* at ¶66, quoting 49 U.S.C. §20702(1), and *Lavender v. Kurn* (1946), 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed.2d 916.

{¶ 36} Second, the testimony of Shepard's coworker, Larry Berger, that sometimes fumes came into the cabs because employees opened the windows, must be taken in context. Specifically, Berger testified that the fumes would come in through cracks that were present throughout the cab. He described that "[t]he smoke comes from everywhere feasible. There is no way to escape it. It's an impossibility to escape." Berger therefore testified that the only way to ventilate the cab was to open the windows.

{¶ 37} Similarly, Shepard described the fumes as "suffocating," and testified that he and his coworkers would sometimes stuff the cracks with paper towels. Moreover, one of Grand Trunk's experts, Edward English, admitted that under the circumstances described by Shepard and Berger, a violation of the LIA occurred. Shepard further testified that he was exposed to diesel fumes when he worked in the yard where the engines operated.

{¶ 38} On this record, the trial court properly denied the railroad's motions for a directed verdict and JNOV as to Shepard's claim based on exposure to diesel fumes.

2. Asbestos Exposure

{¶ 39} Grand Trunk also claims that Shepard failed to demonstrate an injury based on asbestos exposure. In support of its claim, the railroad argues that the mere presence of asbestos on a locomotive is not a violation of any federal regulation, as admitted by Shepard's expert, Dr. Vance. The evidence presented by Shepard went beyond the mere presence of asbestos, however. For example, Shepard testified about pipes on the locomotives wrapped in "raggedy" asbestos insulation and that asbestos was "piled up" in a tool cage in the roundhouse. Berger, Shepard's co-worker, also testified to asbestos being out in the open.

{¶ 40} On this record, the trial court properly denied Grand Trunk's motions for a directed verdict and JNOV on Shepard's LIA claim based on asbestos exposure.

{¶ 41} In light of the above, the second assignment of error is overruled.

Jury Instructions

{¶ 42} Grand Trunk contends that, over its objection, the trial court improperly quantified the degree of causation in its negligence instruction to the jury. Specifically, the trial court included the phrases "however slight," "no matter how slight," and "even the slightest" in its causation instruction. The railroad sought to have the court instruct with the phrase "in whole or part." The railroad largely relies

on two United States Supreme Court cases in support of its contention that the instruction given was in error: *Norfolk S. Ry. Co. v. Sorrell* (2007), 549 U.S. 158, 127 S.Ct. 799, 166 L.Ed.2d 638, and *CSX Transp., Inc. v. Hensley* (2009), __U.S.__, 129 S.Ct. 2139, 173 L.Ed.2d 1184. The railroad further argues that this court's decision in *Hager*, supra, which supports the instruction given, is flawed. We disagree.

{¶ 43} In *Sorrell*, the Supreme Court *declined* to address what standard for railroad negligence and employee contributory negligence should be used in instructing a jury in a case brought under the FELA. Rather, the Court held "that the causation standard should be the same for both categories of negligence[.]" Id. at 160.[3] Further, *Hensley* is not helpful to this case. Grand Trunk quotes with emphasis as follows from *Hensley*: "'* * * the nature of [asbestos] claims enhance the danger that a jury, without proper instruction, could award * * * damages based on slight evidence * * *.'" Grand Trunk's Brief at pg. 25, quoting *Hensley* at 2141. That quote, however, must be considered in context.

{¶ 44} Hensley brought suit against the railroad under the FELA for injuries sustained from his exposure to asbestos and a cleaning agent. He sought pain-and-suffering damages based on, among other things, his fear of developing lung cancer in the future. The trial court denied the railroad's proposed jury instruction that "'[i]n order to recover, Plaintiff

---

[3] As noted by Grand Trunk, the trial court did not use the same phraseology it used when instructing on the railroad's negligence as when instructing on Shepard's negligence. We find the error to be harmless, however, in light of the fact that the jury found Shepard 82% negligent for his COPD and heart condition and 85% negligent for his laryngeal cancer.

must demonstrate * * * that the * * * fear is genuine and serious.'" Id. at 2140, quoting defendant's proposed jury instruction no. 30. The Supreme Court held that the trial court erred by not giving the instruction, stating:

{¶ 45} "Instructing the jury on the standard for fear-of-cancer damages would not have been futile. To the contrary, the fact that cancer claims could 'evoke raw emotions' is a powerful reason to instruct the jury on the proper legal standard. Giving the instruction on this point is particularly important in the FELA context. That is because of the volume of pending asbestos claims and also because the nature of those claims enhances the danger that a jury, without proper instructions, could award emotional-distress damages based on slight evidence of a plaintiff's fear of contracting cancer. But as this Court said in [*Norfolk & W. Ry. Co. v.*] *Ayers* [(2003), 538 U.S. 135, 123 S.Ct. 1210, 155 L.Ed.2d 261], more is required. Although plaintiffs can seek fear-of-cancer damages in some FELA cases, they must satisfy a high standard in order to obtain them. 538 U.S., at 157-158, and n. 17, 123 S.Ct. 1210. Refusing defendants' requests to instruct the jury as to that high standard would render it all but meaningless." *Hensley* at 2141.

{¶ 46} Because the *Hensley* Court was concerned with jury instructions for the unique aspect of emotional-distress damages based on the fear of developing cancer in the future, Grand Trunk's citation to that case is misplaced.

{¶ 47} In *Rogers v. Missouri Pacific RR. Co.* (1957), 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493, the United States Supreme Court considered whether, under a claim based on the FELA, the probative facts of the

case warranted submission of the case to the jury. The court held that "the test of a jury case is simply whether the proofs justify with reason the conclusion that [employer] negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Id. at 506. Citing *Rogers*, this court in *Hager*, supra, upheld jury instructions in a FELA railroad case containing the phrase "even the slightest." We similarly uphold the instructions given in this case. Accordingly, the third assignment of error is overruled.

Motion for New Trial

{¶ 48} In its fourth assigned error, Grand Trunk contends that the trial court committed numerous errors, all involving the admission or exclusion of evidence, the cumulative effect of which entitled it to a new trial.

{¶ 49} The decision to grant or deny a motion for new trial rests in the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 1995-Ohio-224, 649 N.E.2d 1219. The admission or exclusion of evidence is likewise within the sound discretion of the trial court. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶20. An abuse of discretion is more than an error in judgment or a mistake of law; it connotes that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

1. Disparate Application of Loc.R. 21.1 of the Court of Common Pleas of Cuyahoga County, General Division[4]

{¶ 50} Grand Trunk contends that the trial court disparately applied the rule because it precluded the railroad's expert from testifying about the lack of studies linking Shepard's cancer to asbestos exposure, but allowed Shepard's expert to testify as to his prognosis of death, which was not contained in his expert report. The primary purpose of the rule is "to avoid prejudicial surprise resulting from noncompliance with the report requirement." *Blandford v. A-Best Products*, Cuyahoga App. Nos. 85710 and 86214, 2006-Ohio-1332, ¶14.

{¶ 51} The railroad's expert, Dr. Pierre Lavertu, acknowledged in his expert report that there were studies showing a "possible association" between laryngeal cancer and asbestos exposure. The railroad sought to have him testify at trial that there were *no* studies linking asbestos exposure to laryngeal cancer and that the studies finding a causal link between the two did not involve any throat specialists. The testimony the railroad sought to elicit was contrary to Dr. Lavertu's report. The trial court therefore did not abuse its discretion by not allowing it.

{¶ 52} Likewise, the trial court did not abuse its discretion by allowing Shepard's expert, Dr. Shakil

---

[4] The rule provides in relevant part as follows: "A party may not call a non-party expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. * * * The report of a non-party expert must reflect his opinions as to each issue on which the expert will testify. A non-party expert will not be permitted to testify or provide opinions on issues not raised in his report."

Khan, to testify as to Shepard's prognosis of death. The trial court reasoned that, although such prognosis was not contained in Dr. Khan's report, the prognosis would not "come [ ] as any great surprise to the defense." This court has previously held that application of Loc.R. 21.1 "must be determined on a case-by-case basis." *O'Connor v. Cleveland Clinic Found.*, 161 Ohio App.3d 43, 2005-Ohio-2328, 829 N.E.2d 350, ¶21. With that in mind, and affording due deference to the trial court as we must, there was no abuse of discretion by allowing Dr. Khan's testimony.

2. Testimony From Shepard's Expert, Dr. Arthur Frank, Regarding the Causal Relationship Between Shepard's Cancer and his Asbestos Exposure

{¶ 53} The railroad contends that Dr. Frank's testimony and opinion regarding Shepard's laryngeal cancer were not based on reliable scientific, technical, or other specialized information as required under Evid.R. 702. We disagree.

{¶ 54} Dr. Frank relied on several sound scientific sources, including the National Academy of Science and the Journal of the American Medical Association, in forming his opinion. He admitted that there were reliable and valid sources rendering opinions on both sides of the issue of whether there is a causal relationship between laryngeal cancer and asbestos exposure. Even the railroad's expert on this issue, Dr. Lavertu, testified that "although the relationship between asbestos and laryngeal cancer is still controversial many studies have [shown] a possible association with a risk factor around 1.5." Dr. Frank's testimony was proper under Evid.R. 702, and the trial court did not abuse its discretion by allowing it.

3. Photographs and the United Transportation Union Complaint Letter

{¶ 55} Three photographs of locomotives were admitted into evidence over the railroad's objection. The locomotives in the photographs were not ones on which Shepard had worked, but he testified that they depicted the working conditions under which he had worked. Grand Trunk contends that the photographs were (1) not authenticated under Evid.R. 901(A), (2) irrelevant, and (3) highly prejudicial.

{¶ 56} Evid.R. 901(A) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Shepard testified what the photographs depicted and that the conditions shown in the images were fair and accurate representations of the locomotives and roundhouses on and in which he worked. The photographs were therefore authenticated.

{¶ 57} Further, the conditions under which Shepard worked were relevant and the probative value of the photographs was not "substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). Moreover, prior to the use of the photographs, the trial court gave a limiting instruction to the jury, in which it explained that there was no indication that the photographs were of locomotives on which Shepard actually worked and cautioned the jury that "[t]hey are solely given to you because Mr. Shepard says, '[t]his looks like what I was working under,' but it's for you ultimately to decide whether or not you want to accept that." On this record, the trial court did not

abuse its discretion by admitting the photographs into evidence.

{¶ 58} The Union letter, dated December 17, 1971, which was read by Dr. Vance (Shepard's expert) during his testimony, refers to a complaint about diesel fumes made by employees at Grand Trunk's Pontiac, Michigan site.[5] Grand Trunk objected to the letter on the grounds that (1) it was unauthenticated, (2) it was irrelevant because Shepard never worked at the Pontiac, Michigan site, (3) it was highly prejudicial.

{¶ 59} Documents can be authenticated under the ancient documents rule contained in Evid.R. 901(B)(8) if, "[e]vidence that a document * * *, in any form, (a) is in such condition as to create no suspicion concerning its authenticity, (b) was in a place where it, if authentic, would likely be, and (c) has been in existence twenty years or more at the time it is offered."

{¶ 60} The letter was obtained by Shepard's counsel from Grand Trunk through discovery in another case. There was no evidence creating suspicion about its authenticity, and it was more than 20 years old at the time it was used. On this record, the letter was authenticated. Moreover, as with the photographs, the letter was relevant and its probative value was not "substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A).

{¶ 61} In light of the above, the trial court did not abuse its discretion by admitting the photographs

---

[5] The letter was not admitted into evidence, but Grand Trunk contends that "the harm was already done as the jury was made aware of the contents of this unauthenticated, irrelevant and prejudicial letter through Dr. Vance's testimony."

into evidence and allowing Dr. Vance to read the Union letter during his testimony.

4. Exclusion of the Locomotive Crash Worthiness and Cab Working Conditions Report for Purposes of Cross-Examining Dr. Vance

{¶ 62} The Report was created in 1996 by the Federal Railroad Administration and contained the investigative results performed by General Electric and the Electromotive Division of General Motors (the same manufacturers used by Grand Trunk during the period of Shepard's employment) regarding the asbestos exposure in locomotive cabs.

{¶ 63} In *Hager*, supra, this court addressed the use of the Report in cases where the employee retired before its creation, stating that "the report was published in 1996, nine years after [the employee] ended his employment with the railroad. There was no evidence presented that any of the statements contained in the report accurately represented the working conditions encountered by [the employee] between 1943 and 1987." Id. at ¶23.

{¶ 64} Here, Shepard retired from Grand Trunk in 1991, five years before the Report was created. Thus, on the authority of *Hager*, the report was properly excluded.

5. Dr. Vance's Reading to Jury Portions of Shepard's Discovery Deposition

{¶ 65} At trial, Dr. Vance read a portion of Shepard's discovery deposition and testified that he relied on that portion of the deposition in forming his opinion. The railroad objected because Dr. Vance's testimony came after Shepard's trial testimony, Shepard did not testify at trial to the portion of his discovery

deposition read by Dr. Vance and, therefore, the railroad was not able to cross-examine him on this testimony.[6]

{¶ 66} The railroad cites *Hager* in support of its contention. There, the defendant railroad sought to present evidence of the employee's prior lawsuits and to read his interrogatory answers and his depositions from those lawsuits to impeach his credibility. The trial court refused the request, and this court affirmed, stating "[t]he trial court properly refused to allow [the railroad] to introduce evidence regarding [the employee's] prior lawsuits after his trial testimony had been completed. The proper time to have pursued this matter would have been when [the employee] was cross-examined. However, [the railroad] failed to ask him regarding his other lawsuits during cross-examination. [The railroad] could not then attempt to impeach him by reading his interrogatories and depositions from other lawsuits because this would prevent [the employee] the opportunity to provide further explanation. Because of his health problems, [the employee] was not present at the trial, and could not have been called to rebut this evidence." Id. at ¶20.

{¶ 67} Here, the testimony was not offered for the purpose of impeachment; rather, it was offered as an explanation of the basis of Dr. Vance's opinion. Evid.R. 705 provides that "[t]he expert may testify in terms of opinion or inference and give the expert's reasons therefor after disclosure of the underlying

---

[6] Specifically, Shepard testified at deposition that "I would be walking through the roundhouse on a sunny day. It was so dusty with asbestos that you couldn't see your hand in front of your face."

facts or data." The rule requires disclosure to "insure that the trier of facts is aware of the facts upon which the [expert's] opinion rests, so that in the event that the trier of facts rejects these facts as not having been established by the evidence, it will then be warranted in rejecting the opinion also." *Mayhorn v. Pavey* (1982), 8 Ohio App.3d 189, 191, 456 N.E.2d 1222.

{¶ 68} Further, the trial court gave a cautionary instruction to the jury, advising it that Dr. Vance was reading from Shepard's discovery deposition, not his trial testimony, and it would be up to the jury to determine whether Shepard's testimony was reliable. Moreover, Dr. Vance's report provided that, in forming his opinions, he "talked with Mr. Shepard and read his [discovery] deposition." Thus, the railroad was put on notice that the basis of Dr. Vance's opinions would be disclosed at trial. Accordingly, the trial court did not abuse its discretion by allowing Dr. Vance to read a portion of Shepard's deposition testimony.

6. Shepard's and Berger's Testimony about the Asbestos Content of Dust and Pipe Covering

{¶ 69} The Railroad contends that the trial court improperly allowed Shepard and his co-worker, Berger, to testify about their exposure to asbestos and asbestos-containing products because a foundation was not laid to demonstrate that they had personal knowledge of asbestos.

{¶ 70} Evid.R. 602 provides in part that, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."

{¶ 71} This court addressed this argument in *Shesler*, supra, where the defendant railroad contended that testimony given by the plaintiffs about their exposure to asbestos lacked a proper foundation. The two plaintiffs testified that they became familiar with asbestos during their 40-plus years working for the railroad. Further, one plaintiff testified that he saw the word "asbestos" marked on materials being used. Both plaintiffs testified that they saw asbestos in the cabs of the locomotives on which they worked and witnessed other employees working with it around the yard.

{¶ 72} This court found that the testimony was properly admitted because "it [was] clear that the [plaintiffs] offered sufficient evidence to establish their personal knowledge of asbestos products, specifically, their personal exposure to products containing asbestos while employed on the railroad." Id. at ¶23. This court distinguished that case from *Goldman v. Johns-Manville Sales Corp.* (1987), 33 Ohio St.3d 40, 514 N.E.2d 691, a case relied on by Grand Trunk here.

{¶ 73} In *Goldman*, the Ohio Supreme Court held that the wife of a former bakery worker could not offer affidavits from several witnesses that they "believed" and "were told" that certain products in the bakery contained asbestos because they were not based on the personal knowledge of the witnesses.

{¶ 74} This court held that "there is a marked difference in the testimony of the [plaintiffs] based on personal knowledge which specifically referred to asbestos as opposed to the situation in *Goldman*, which was based largely on speculation and allegations by secondary witnesses." *Shesler* at ¶21. Likewise, here, Shepard and Berger had personal knowledge of the

presence of asbestos from their extensive railroad careers — 40-plus years for Shepard and almost 30 years for Berger. Both testified that they knew what asbestos looked like, they knew it was used on the railroad, and it was present on the railroad throughout their careers. On this record, the trial court properly allowed Shepard's and Berger's testimony.

7. The 1995 Deposition Testimony of Robert Yeager and the 1999 Videotape Deposition Testimony of Dr. Vincent Gallant

{¶ 75} Grand Trunk's final two grounds for a new trial were based on the trial court allowing Shepard to (1) read into evidence portions of the 1995 deposition testimony of Robert Yeager and (2) play the 1999 videotape deposition testimony of Dr. Vincent Gallant. The witnesses were declared unavailable and their testimony was therefore exempted from the hearsay rule. Grand Trunk contends that their testimony should have been excluded because they were not deposed for this case, and their testimony was irrelevant and unfairly prejudicial.

{¶ 76} Evid.R. 804 governs hearsay exceptions when a witness is unavailable. Subsection A of the rule defines unavailability and "includes any of the following situations in which the declarant: * * * (4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity[.]" If the proponent of the testimony can demonstrate unavailability, Evid.R. 804(B)(1) allows testimony given at another hearing of a different proceeding to come into evidence "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to

develop the testimony by direct, cross, or redirect examination."

{¶ 77} Yeager, who was deceased at the time of the trial here, had been a co-worker witness in a Michigan asbestos case against Grand Trunk. Because Yeager was deceased at the time of trial, he was an unavailable witness under Evid.R. 804(A)(4). Dr. Gallant, who was the former Grand Trunk medical director, a Michigan resident, and had previously testified in a Michigan asbestos case (a different case from Yeager's), indicated to Shepard that he would not appear in court to testify because of his advanced age of 80 and poor health. Because of his physical illness or infirmity, Dr. Gallant was also an unavailable witness under Evid.R. 804(A)(4). We therefore consider whether Grand Trunk had an opportunity and similar motive to develop Yeager's and Dr. Gallant's testimony in the Michigan cases as required under Evid.R. 804(B)(1). Upon review, we find that it did.

{¶ 78} Specifically, both Michigan cases involved work injuries stemming from asbestos exposure on Grand Trunk's railroad. The witnesses' testimony in the Michigan cases was presented to prove that the railroad's locomotives contained asbestos (Yeager), and the railroad was aware of the asbestos and its harmful affects, and to show what, if any, training, education, or protection it gave to its employees (Dr. Gallant). On this record, Grand Trunk had an opportunity and similar motive to develop the testimony. Moreover, the testimony was relevant and was edited so that only the pertinent portions were admitted. Finally, the probative value of the testimony was not "substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading

the jury." Evid.R. 403(A). On this record, the trial court did not abuse its discretion by allowing the testimony.

{¶ 79} In light of the above, the trial court did not abuse its discretion by denying Grand Trunk's motion for a new trial, and the fourth assignment of error is overruled.

Motion for Remittitur

{¶ 80} For its fifth and final assigned error, Grand Trunk contends that the jury's award was manifestly excessive and subject to remittitur. We disagree.

{¶ 81} We review a trial court's decision to deny remittitur under an abuse of discretion standard. See *Betz v. Timken Mercy Med. Ctr.* (1994), 96 Ohio App.3d 211, 218, 644 N.E.2d 1058. "The assessment of damages is a matter within the province of the jury." *Carter v. Simpson* (1984), 16 Ohio App.3d 420, 423, 476 N.E.2d 705. It is not proper for the reviewing court to substitute its opinion for that of the jury. *Litchfield v. Morris* (1985), 25 Ohio App.3d 42, 44, 495 N.E.2d 462. The denial of a motion for remittitur is not erroneous unless the award is so excessive as to appear to be the result of passion or prejudice on the part of the jury, or unless the amount awarded is excessive and against the manifest weight of the evidence. Id. To reverse the jury's damage award, it must appear to be "so disproportionate as to shock reasonable sensibilities." *Jeanne v. Hawkes Hosp. of Mt. Carmel* (1991), 74 Ohio App.3d 246, 258, 598 N.E.2d 1174.

{¶ 82} The jury awarded Shepard $775,000 in unliquidated damages ($650,000 for his COPD and heart condition and $125,000 for his laryngeal cancer).

It is Grand Trunk's contention that the award should have been reduced by Shepard's negligence.

{¶ 83} This court addressed this issue of apportionment of damages in *Ball v. Consol. Rail Corp.* (2001), 142 Ohio App.3d 748, 756 N.E.2d 1280:

{¶ 84} "The FELA allows workers to recover if an employer's negligence or statutory violation contributed in any way to their injuries. *Rogers v. Missouri Pacific RR. Co.* (1957), 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493. The statute also requires a parallel apportionment of damages whenever the evidence shows a worker's contributory negligence caused any part of his injuries. *Dixon v. Penn Cent. Co.* (C.A.6, 1973), 481 F.2d 833, 835. Apportionment is not allowed, however, where an employer is liable for violating certain safety statutes, including the Locomotive Boiler Inspection Act ("LBIA"). *Rogers*, 352 U.S. at 506, fn. 12. Because the jury found an LBIA violation, [the railroad] was not entitled to apportionment for contributory negligence * * *." (Parallel pinpoint cites omitted.) Id. at 754.

{¶ 85} Here, the jury was specifically instructed that Shepard alleged that two statutory violations were at issue: (1) the FELA, which requires negligence and provides for comparative negligence and (2) the LIA, which imposes absolute liability. Under FELA, the jury found Grand Trunk negligent and also found Shepard comparatively negligent. But because the jury further found that the railroad had violated the LIA, under well-settled law, it was not entitled to apportionment of damages under a comparative negligence defense.

{¶ 86} The award was not excessive in light of Shepard's health problems. He suffered with cancer,

which was resolved after two years of extensive radiation treatments. He suffers with severe and debilitating breathing problems, has been totally oxygen dependent since 2006, was hospitalized three times in 2008, and was placed on a mechanical ventilator at least once. Moreover, Grand Trunk's contention that the post-verdict discussions with the jury demonstrated that they believed the award was going to be reduced is not persuasive — a party many [sic] not challenge the validity of the verdict using post-verdict discussions with jurors. *Cleveland Elec. Illuminating Co. v. Astorhurst Land Co.* (1985), 18 Ohio St.3d 268, 274, 480 N.E.2d 794, citing Evid.R. 606(B). The jury was properly instructed and is presumed to have followed those instructions. *Nolan v. Conseca Health Ins. Co.*, Jefferson App. Nos. 07 JE 30, 07 JE 31, 2008-Ohio-3332, ¶196.

{¶ 87} In light of the above, the fifth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
COLLEEN CONWAY COONEY, J., CONCUR

APPENDIX D

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
ASBESTOS DOCKET

Case No: 558055
JUDGE HARRY A. HANNA

WILLIAM SHEPARD,
Plaintiffs,

vs.

GRAND TRUNK WESTERN
RAILROAD, INC., *et al.*,
Defendant.

OPINION

Introduction

Defendant, Grand Trunk Western Railroad Incorporated (Grand Trunk) moves this Court to enter judgment notwithstanding the verdict, or alternatively, requests a new trial. A two week trial concluded on November 7, 2008, when the jury verdict was journalized for Eight Hundred Seventy-Two Thousand Seven Hundred Fifty-Six Dollars($872,756.00). The Court denies Grand Trunk's Motion for Judgment Notwithstanding the Verdict and denies the request for a new trial.

Law and Argument

1. Grand Trunk moves the Court under Civ. R. 50 (B) to enter judgment notwithstanding the verdict (JNOV) because Grand Trunk believes the jury's verdict is not supported by substantial evidence.

Grand Trunk argues that Plaintiff failed to submit during the course of trial a specific violation of the Locomotive Inspection Act, 49 U.S.C. §20707 *et seq.* (LIA). Section 207010 of the LIA states:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad lines only when the locomotive or tender and its parts and appurtenances—
>
> (1) are in proper condition and safe to operate without necessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

49 U.S.C. §20701.

Grand Trunk argues that Plaintiff failed to present any evidence of a particular defect in regards to the diesel exhaust to establish his claim under the LIA. The Court does not agree. Plaintiff testified about diesel fumes coming up from the floorboards of the cabs and through the loose windows and doors. Plaintiff testified regarding sticking paper towels in the windows to keep them from rattling, and at the same time, to keep the fumes from coming into the cab. Plaintiff's testimony is sufficient to establish a violation of the LIA to go to the jury. Arguments made by

Grand Trunk go to credibility, but do not show that the LIA claim was improper to go to the jury.

Grand Trunk argues that Plaintiff failed to present any evidence of a particular violation in regards to the asbestos to establish his claim under the LIA. Again, the Court does not agree. Plaintiff presented evidence of asbestos wrapped around the pipes in the engine room. Additionally, Plaintiff presented evidence that the pipes were raggedy. The evidence presented is sufficient to establish a violation of the LIA if believed by the jury.

2. Grand Trunk moves the court to grant a new trial under Civ. R. 59 (A) (6) because Grand Trunk believes the judgment is not sustained by the weight of the evidence.

Grand Trunk argues that a new trial should be granted because the evidence is inadequate to establish Plaintiff's LIA claim. Grand Trunk believes that the LIA claim cannot be sustained by the weight of the evidence. The argument presented was addressed in Grand Trunk's Motion for Remittitur, which was denied. Plaintiff presented evidence during the course of trial, and Grand Trunk disputed the evidence. The jury made a determination based on the evidence presented. The judgment is sustained by the weight of the evidence.

3. Grand Trunk moves the Court to grant a new trial under Civ. R. 59 (A) (7) & (9) because Grand Trunk believes the judgment is contrary to law and/or errors of law occurring at trial and were brought to the attention of the trial court.

Grand Trunk moves the Court for a new trial under Civ. R. 59 (A)(7) because Grand Trunk believes that the judgment is contrary to the law or under Civ. R. 59 (A)(9) because an error of law occurred and

was brought to the attention of the trial court. Defendant argues that good cause exists for granting a new trial because of the multiple errors of law occurring at trial.

An argument presented is that the Court erred in instructing the jury that the railroad is liable if its negligence played any part, even in the slightest, in causing Plaintiff's injuries. The phrase "even in the slightest" comes from *Rogers v. Missouri P.R. Co.* (1957), 352 U.S. 500, 506. It is a doctrine "which is long settled." *Norfolk S. Ry. Co. v. Sorrell* (2007), 127 S.Ct. 799. Besides, Grand Trunk waived any claim of error when it declined to offer corrections to the charge when invited by the court to do so.

An argument presented is that the cumulative errors that include the unfair prejudice to Grand Trunk due to the application of Loc. R. 21.1 warrant a new trial. It was clear from discussions on and off the record that Grand Trunk was seeking to elicit from Dr. Lavertu an opinion that Plaintiff's cancer could not be attributed to exposure to asbestos. This would have been fatal, if believed, to Plaintiff's claim and was not in the witness's report. There is not a hint of such an opinion expressed in the report, so to permit the doctor to so testify would have been unfairly prejudicial to the Plaintiff.

Dr. Khan's records, on the other hand, indicate that the Plaintiff's disease was both chronic and progressive, thus leading to the inference that it would probably be the cause of his death. There was no impropriety in allowing Dr. Kahn to offer that opinion. The near-death episodes of pulmonary failure already experienced by Plaintiff also supported that opinion. The application of Loc. R. 21.1 was even handed and based upon the evidence.

Grand Trunk argues that the jury interrogatories were misleading and ambiguous. The argument is not well taken. The interrogatories were proposed by the Defendant and re-typed by the Defendant after hours of argument over the charge and interrogatories. Furthermore, no objection or correction was offered by the Defendant when invited by the Court near the conclusion of the charge. At no time did Grand Trunk articulate any improprieties in its own requested interrogatories.

Another argument presented is that it was an error to permit Plaintiff and his co-worker to testify about the pipe covering containing asbestos. Both Mr. Shepard and Larry Berger gave testimony that each man had working knowledge of asbestos based upon the years of working around it on the railroad. Grand Trunk's argument fails according to *Shesler v. Conrail* (2003), 151 Ohio App. 3d 462.

Conclusion

Grand Trunk moves for a judgment notwithstanding the verdict pursuant to Rule 50(B) of the Ohio Rules of Civil Procedure, and for a new trial pursuant to Rule 59 (A)(6), (7) and (9) of the Ohio Rules of Civil Procedure. Defendant has failed to show that the verdict was not supported by substantial evidence or that errors of law occurred requiring a new trial. For all of these reasons, Defendant's Motion for JNOV is Denied and Defendant's request for a new trial is Denied.

[RECEIVED FOR FILING
DEC 24 2008]

So Ordered

/s/ Judge Harry A. Hanna
Judge Harry A. Hanna
December 16, 2008

APPENDIX E

FEDERAL STATUTES

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

49 U.S.C. § 20701. Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

APPENDIX F

FEDERAL REGULATION

49 C.F.R. § 229.43. Exhaust and Battery Gases

(a) Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions.

(b) Battery containers shall be vented and batteries kept from gassing excessively.